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PUTTING A CURB ON BID SPECULATORS

By William Charnley and James Broadhurst

Putting a curb on bid speculators

Kraft's takeover of Cadbury has pushed takeover regulation in the United Kingdom onto the political agenda in 2010. Takeover regulation has made appearances in two of the mainstream political parties' election manifestos and in the coalition's "Programme for Government".

The Takeover Panel took the early lead by publishing its wide-ranging consultation paper on the regulation of takeover bids in June. The paper picked up on a number of proposals made in various quarters during and after the Cadbury bid. Unusually and interestingly, the Panel adopted a neutral tone when putting forwards the various proposals.

Sensibly, the new government is adopting a wait-and-see approach before proceeding with its own plans to consult in this area, but, to a certain degree, this treading of water represents a shift in pace from recent political rhetoric. At this stage, it seems unlikely that there will be much substantive change to the Takeover Code but the paper has been useful to raise awareness of a number of important and topical issues.

As the then Secretary of State for Business articulated "it is hard to ignore the fact that the fate of [Cadbury] ... was decided by people who had not owned the company a few weeks earlier, and probably had no inten-

tion of owning it a few weeks later". One recurring theme in the consultation paper has been to explore various options to curb certain market players' short-term, but legitimate, profit-making agendas. To this end it has queried whether the Takeover Code, which does not distinguish between existing shareholders in a target company and persons who buy shares during the course of an offer period, should in fact do so. If shares bought during an offer period were "disenfranchised", it may help to ensure that the outcome of a takeover bid is decided by long-term shareholders and characterised by their long-term goals rather than any short-term speculation.

Disenfranchisement is difficult to support given the Code's first general principle that all holders of the securities of a target company of the same class must be afforded equivalent treatment. It would also be almost unworkable to oversee due to the potential for unrecorded changes of beneficial ownership. It also begs the question of what would happen if during an offer period existing shareholders sold shares and then bought more, would they be disenfranchised?

Disenfranchising new shareholders could deny the effect they have on increasing bid prices. Demand for shares would be decreased as there would be fewer buyers and as such the premium given by bidders on their initial offer could be perceived by a



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board of directors as sufficient and therefore there could be little need for a bidder to increase its bid.

The consultation paper also asked for views on raising the minimum acceptance condition threshold for offers above the current level of a bare majority. A bare majority is viewed by some as an easily obtainable threshold for a bidder and so again encourages short-term profit taking. To put it plainly the ability to determine board composition and consequently the ability to manage a company's business requires an ordinary resolution (or bare majority), so unless the threshold to pass an ordinary resolution under UK company law is changed there would be an undesirable incongruity between the Takeover Code's acceptance condition and UK company law.

It may well be that the government believes new solutions are needed to curtail short-term profit makers but thankfully we do not have to revert to inauspicious times when an ambiguous public interest test allowed them to choose the destiny of a takeover bid. The government's statement that it has no current plans to amend the legislation governing the power to intervene in mergers on public interest grounds is welcome news.

The consultation has provided a forum for some of the core principles of UK takeover regulation to be debated but it is unlikely that the proposed mechanics designed to curb certain market makers short term habits will lead to much change, if any, to the Takeover Code. We shall see what the Panel decides in the future but for now it would seem that company shareholder registers will continue to move during an offer period. The former chairman of Cadbury, Roger Carr, was reported to have stated that 26% of Cadbury's shares changed hands during the transaction.